No. 12738

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FRED D. HILLIARD, As Receiver of JESSE M. CHASE, INC., A Corporation,

Appellant,

vs.

LOUISE B. MUSSELMAN SISIL,

Appellee.

Reply Brief of Appellant

Appeal from the United States District Court for the District of Idaho, Eastern Division.

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GATEWAY PRINTERS - POCATELLO

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Reply Brief of Appellee

STATEMENT

Appellee's brief brings into question the transfer of the real estate, the subject matter of this action, by appellant to C. C. Anderson Company of Caldwell, a corporation, pendente lite, as a defense. We deem it advisable to reply thereto.

First, we desire to make a correction. Appellant's specification of error No. 6 assigns as error that the trial court erred in making its Finding of Fact XII, on the ground that same

was a conclusion of law contrary to both the evidence and the law. Said Finding No. XII, page 27, reads as follows:

> "That the plaintiff herein subsequent to the rendition of the judgment in favor of Louise B. Musselman Sisil and against Jesse M. Chase in Case 1539 as aforesaid and subsequent to the filing and recording of an abstract of said judgment in the office of the County Recorder of Bannock County, Idaho, sold the real estate described in plaintiff's amended complaint."

We find we misread the finding, apparently construing the word "plaintiff" as meaning the plaintiff in said case No. 1539, Sisil v. Chase, instead of the appellant, who is plaintiff in this action. We wish to apologize to both Court and Counsel for this error. We concede that the finding is correct, and our specification of error regarding said finding is not well taken on the grounds specified. However, we take the position that the court erred in making said finding on the ground that it is immaterial, and we desire the courts indulgence to restate said specification, so that it will read as follows:

"VI.

> "The trial court erred in making Finding of Fact XII (p. 27) for the reason that the same is immaterial."

There are other matters in appellee's brief that we desire to reply to, but it consists largely of argument in distinguishing the cases cited in support of her position, from the law as

laid down in the authorities cited by appellant in his original brief, and for the sake of brevity, we will leave those matters to the consideration of the court, and to oral argument. This reply brief therefore will be addressed to the one point, which concerns the effect of transfer of interest, pendente lite.

SUMMARY OF ARGUMENT.

In the case of any transfer of interest, the action may be continued by or against the original party.

Rule 25 (c)—RULES OF PROCEDURE FOR FEDERAL DISTRICT COURTS.

McComb v. Row River Lumber Company. C. A. 9th, 1949, 177 F. 2d 129.

French v. Edwards, Fed. Case No. 5,097. 9 Fed. Cases page 778.

Elliot v. Teal, Fed. Case No. 4,389. 8 Fed. Cases page 537.

47 C. J. 160, and cases therein cited.

Western Land & Irrigation Co. v. Humfeld, 114 Ore. 53, 234 Pac. 797.

Statutes similar to Rule 25(c) were made to promote utility and convenience in the prosecution of remedies by doing away with the unnecessary expense and delay of commencing a second action for the same cause.

Elliot v. Teal, Supra.

The transferee of real property, pendente lite, is protected in his interest in the res, by Section 55-605 of the Idaho Code, and hence subsitution is not necessary, said Section providing that any subsequently acquired title passes by operation of law to the grantee or his successors.

Idaho Code 55-605.

ARGUMENT.

It is our position that *Rule 25(c) of the District Court Rules of Procedure* is conclusive.

> Rule 25 (c) "In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party."

The only case we find where this court has construed the above rule is *McComb v. Row River Lumber Co.*, 177 F 2d 129. And in that case this court said:

> "The Rules of Civil Procedure 'govern the procedure in the district courts of the United States,' Rule 1. These rules are adopted by this court wherever applicable with respect to appeals in civil actions. But it will be noted that under Rule 25 (c) it is not mandatory that a substitution be made in every case of a transfer of interest."

> "Where we have allowed a substitution, it has been in cases where the plaintiff below has transferred his interest in the subject matter of the action, which was to protect an interest in a res."

The general rule with regard to substitution of parties where a party makes an assignment pendente lite, is stated in 47 C. J., at page 160, as follows:

> "Where a party to an action makes an assignment pendente lite, it is not usually essential for the transferee to be substituted; nor can the opposite party insist on such substitution, it being ordinarily permissible to continue the action in the name of the original plaintiff for the use of the transferee."

In Federal Case No. 5,097, *French v. Edwards,* 9 Fed. Cases 778, the Court held:

> "Where in an action to recover land, the plaintiff conveys to a stranger the premises in controversy, pendente lite, under the Code of Procedure of the state of California, the action may be prosecuted to judgment in the name of the original party; and such conveyance cannot be set up by way of supplemental answer to defeat a recovery of possession."

The provision of the California Code at that time is set forth in the opinion and reads as follows:

> "In case of any other transfer of interest the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action."

This is identical to Idaho Code, Section 5-319.

In the case of Elliot v. Teal, Fed. Case No. 4389, 8 Fed. Cases 537, the court held:

> "The rule of the common law that an action abated by the termination or transfer of the plaintiff's interest therein, pendente lite, is abrogated by section 37 of the Oregon Civil Code, which declares that no action shall abate for any such cause; and Section 27 of said Code which provides that 'every action shall be prosecuted in the name of the real party in interest, must, in connection with said section 37, be taken to mean that every action shall be commenced in the name of the real party in interest." Syl. 1.

The Idaho Code provisions with regard to abatement of proceedings on death or transfer of interest is fully set forth as follows:

> "5-319. DEATH OR TRANSFER OF INTEREST — PROCEDURE — ACTIONS BY OR AGAINST PUBLIC OFFICERS.—An action or proceeding does not abate by the death or any disability of a party, or by the transfer of any interest therein, if the cause of action or proceedings survive or continue. In case of the death or any disability of a party, the court, on motion, may allow the action or proceeding to be continued by or against his representative or successor in interest. In case of any other transfer of interest the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding. An action or proceeding brought by or against any

public officer in his official capacity and which action or proceeding is pending at the time of his death, resignation, retirement or removal from office does not abate. The court on its own motion or on motion for substitution may substitute the successor in office and allow the action or proceeding to be continued against such successor."

In the case of *Western Land & Irrigation Co. v. Humfeld,* 114 Ore. 53, 234 Pac. 797, the Supreme Court of Oregon held that the statutes of the state do not require the substitution of a purchaser of real property involved in a litigation while that litigation is pending.

We have read the Idaho case cited by appellee, *Carrington v. Crandall,* 63 Idaho 651, 124 Pac. (2d) 914, and if this case were in the Idaho courts, we would consider it as binding. However, in this case appellee, through motion for removal of the cause to the United States District Court, chose this forum, and thereby placed it under the Rules of Procedure of the District Courts of the United States. We therefore deem further comment on the same unnecessary, except to state in passing, we have never seen a mor emasterful misinterpretation of plain words of the English Language.

We have examined the other cases cited by appellee in support of this point, and are unable to find any of them applicable.

In this case we find appellee in the anomolous position of urging that the Warranty Deed from Jesse M. Chase and wife to Jesse M. Chase, Inc., the corporation, (Plaint-

tiff's Exhibit No. 3) left remaining in said Chase, some interest which was subject to levy and sale under execution, and at the same time, urging the court that a deed of grant from the Receiver, appellant herein, to C. C. Anderson Company, has divested this court of all jurisdiction to continue with the case. Any interest which appellee could subsequently acquire would pass on directly to the grantee under the provisions of Section 55-605 of the Idaho Code reading as follows:

> "55-605. Where a person purports by proper instrument to convey or grant real property in fee simple, and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or his successors."

Under this code provision, we believe that substitution was entirely unnecessary, as any benefits the appellant acquires as a result of a judgment in his favor passes by operation of law to the C. C. Anderson Company or its successors.

Another thing we note, and that is, that appellee is perfectly willing to take advantage of the fact that appellant is in court, in that he has attempted to bring into the case other issues even to the extent of seeking a determination of lien rights upon personal property, and a declaratory judgment making the amount of the judgment in case 1539, a judgment against this appellant.

We presume that this was one of the reasons she did not raise the transfer of interest question at the close of appel-

lant's case during the trial. In other words, the appellee seems perfectly willing to get all the advantages of the appellant being in court, and now having obtained same by a favorable decision of the lower court, now seeks to urge upon this court, the absurd proposition that appellant had no right in court.

And in this connection we believe that the proper rule of law to apply, in case the court should hold that appellant's action abated by reason of the transfer of interest that, the entire case be dismissed without prejudice in order that the transferee, C. C. Anderson Company, can come into court, and obtain a trial of the issues, without being bound by any decision of the court on matters which might affect its claim of clear title adversely.

CONCLUSION.

The plain wording of Rule 25 (c) permits this case to be continued in the name of the original party, and that the same having been done, that the case should be heard and determined by this court upon its merits on the other issues as presented by the pleadings, the transcript, and briefs of counsel.

It is therefore respectfully submitted that this case should be reversed and the trial court directed to enter judgment as

prayed in plaintiff's complaint, and that appellee's counter claim and prayer for affirmative relief be dismissed.

Respectfully submitted,

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R. DON BISTLINE,

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